

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE	)	
	)	
v.	)	ID No. 0805019287
	)	
KEVIN ROBINSON	)	
	)	
Defendant.	)	

Submitted: October 13, 2011  
Decided: January 31, 2012

**On Defendant's *Pro Se* Motion for Postconviction Relief. DENIED.**

**ORDER**

John Downs, Esquire; Deputy Attorney General, Wilmington, Delaware 19801.  
Attorney for State of Delaware.

Kevin Robinson, James T. Vaughn Correctional Center, 1181 Paddock Road,  
Smyrna, Delaware 19977. *Pro se.*

**CARPENTER, J.**

Before the Court is defendant Kevin J. Robinson's *pro se* Motion for Postconviction Relief filed pursuant to Delaware Superior Court Criminal Rule 61 ("Rule 61"). For the reasons set forth below, Robinson's Motion for Postconviction Relief is DENIED.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Robinson's arrest and conviction stem from a robbery and shooting death that occurred in the parking lot of the Brookview Apartments complex in Claymont, Delaware on July 22, 2006. Robinson and his co-defendant Timothy Austin ("Austin") had traveled from Philadelphia to Claymont to purchase marijuana from the victim Kevin Rafferty ("Rafferty"). Also present at the time was Rafferty's friend and roommate William Witts ("Witts").

On November 17, 2008, Austin pled guilty to Manslaughter, Possession of a Firearm During Commission of Felony, and Robbery First Degree in exchange for agreeing to testify against Robinson. Robinson was tried in April 2009. Witts testified at trial and identified Robinson as the person who had robbed him and exited the vehicle before he heard the gun shot. Austin testified and identified Robinson as the person who shot Rafferty. In addition, Robinson's audio-taped confession was played for the jury.

On April 14, 2009, the jury convicted Robinson of Murder First Degree, Robbery First Degree (two counts), and Possession of a Firearm During Commission of a Felony (three counts). The Delaware Supreme Court affirmed Robinson's convictions on appeal.<sup>1</sup> On May 11, 2011, Robinson filed the present *pro se* Motion for Postconviction Relief. In his Motion, Robinson asserts the following grounds for relief:

- (1) His trial counsel failed to file a motion to suppress the recorded statement in which he admitted to having shot Rafferty;
- (2) His counsel failed to request *Brady* materials in a timely manner before trial;
- (3) His counsel failed to subpoena witnesses who could provide favorable testimony;
- (4) His counsel failed to provide him with complete Rule 16 discovery material, including his statement to the police;
- (5) His counsel failed to advise him properly of his right to testify on his own behalf and gave him bad advice in encouraging him not to testify;
- (6) The Court abused its discretion by failing to instruct the jury properly on the charge of manslaughter;
- (7) The Court erroneously allowed Robinson's coerced taped confession to be entered into evidence;
- (8) The Court let stand a verdict against the weight of the evidence introduced at trial;
- (9) The Court failed to address for the record contact with the jury for which Robinson's counsel was not present; and
- (10) The Court improperly imposed strict limitations on the cross-examination of Austin.

This is the Court's decision on the various claims now raised by the defendant.

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<sup>1</sup> *Robinson v. State*, 3 A.3d 257 (Del. 2010).

## DISCUSSION

As previously indicated, Robinson raises numerous claims of ineffective assistance of counsel, along with several other violations of his constitutional rights. To address them in a logical fashion the Court has grouped them categorically.

### **a. Ineffective Assistance of Counsel**

All claims of ineffective assistance of counsel are governed by the two-part test set forth by the United States Supreme Court in *Strickland v. Washington*.<sup>2</sup> A defendant must show both (1) that counsel's representation fell below an objective standard of reasonableness and (2) that a reasonable probability exists that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.<sup>3</sup> There is a "strong presumption that counsel's conduct was professionally reasonable."<sup>4</sup>

#### *(1) Failure to File Motion to Suppress Unfavorable Evidence*

Robinson's first complaint is that his counsel was ineffective because he failed to file a motion to suppress unfavorable evidence, namely the testimony given by Witt and Austin and Robinson's recorded statement to the police in

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<sup>2</sup> 466 U.S. 668 (1984).

<sup>3</sup> *Wright v. State*, 608 A.2d 731, 1992 WL 53416, at \*1 (Del. Feb. 20, 1992) (TABLE), citing *Albury v. State*, 551 A.2d 53, 58 (Del. 1998).

<sup>4</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1998).

which he admits to shooting Rafferty. This argument is without merit. First, Witt and Austin were witnesses at the trial and the Court is unaware of any legal basis for the Court to exclude their testimony pre-trial. Similarly, it is evident from the record that any suppression motion would have been futile because Robinson's statement to the police was freely given.<sup>5</sup> Accordingly, it was well within the bounds of defense counsel's professional judgment not to file any suppression motions in this case.

*(2) Failure to Request Reported Statement in a Timely Manner*

Robinson next argues that his counsel was ineffective for failing to request his recorded statement in a timely manner, which hindered his ability to prepare for trial. The record does not support Robinson's claims. Robinson's counsel filed a discovery request with the State on June 18, 2008, six days after the case was accepted in Superior Court. Defense counsel further noted in his affidavit that he received the first discovery response from the State on July 7, 2008 and sent copies of the documents to Robinson on the same day. Additionally, defense counsel stated in his affidavit that he did not provide Robinson with a CD copy of his recorded statement because CDs are not permitted in prisons, but he did, with permission from the Department of Correction, bring in a laptop and play the

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<sup>5</sup> *Lego v. Twomey*, 404 U.S. 477, 478 (1972) (reiterating that voluntary confessions may be admitted at the trial of guilt or innocence).

statement for Robinson. There is nothing in the record to suggest that counsel failed to properly obtain discovery or to share it with the defendant. As such, this argument is without merit.

(3) *Failure to Subpoena a Witness to Testify at Trial*

Robinson next argues that his counsel was ineffective for failing to subpoena a witness who told a detective that he had overheard a phone conversation in which Austin had threatened Rafferty. The discussion of this witness and the statement provided is set forth in the Supreme Court opinion.<sup>6</sup> Since the name of the individual who related the contents of this phone call to the police was redacted, there was some initial confusion by counsel as to the witness' identity. But during the trial, the witness' name was disclosed sufficiently in advance to allow him to be subpoenaed. However, counsel made a strategic decision not to subpoena him since the witness was not present during the shooting and the jury was already aware of the animosity between Rafferty and Austin. As stated by the Supreme Court, this strategic decision was "understandable" in light of the evidence presented at trial.<sup>7</sup> Defense counsel's strategic decision not to compel a witness to testify is not generally disturbed and,

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<sup>6</sup> See *Robinson*, 3 A.3d 257, 260-261 (finding that the State did not cause confusion by providing redacted statements, that Robinson's *Brady* rights were not violated, and that Robinson's attorney made a strategic decision not to subpoena the witness).

<sup>7</sup> *Id.* at 261.

here, clearly does not reflect a violation of the high standard for ineffective assistance of counsel under *Strickland*. Robinson cannot show that his counsel's failure to compel testimony from this witness prejudiced him. Moreover, given the limited value of this witness's likely testimony, a strategic decision not to call this witness was within the wide range of counsel's professional judgment.

(4) *Failure to Provide Defendant with a Full Copy of Rule 16 Discovery*

Robinson also contends that his counsel failed to provide him with a full copy of the Rule 16 discovery materials.<sup>8</sup> He claims that he never received a copy of any of the statements his co-defendant made against him and that he never received a copy of his statement to the police. It is first important to emphasize that there is no obligation of counsel to provide material given in discovery to the defendant. While it is a good practice, there is no constitutional requirement to do so.<sup>9</sup> Defense counsel's affidavit indicates that he sent to Robinson all paper documents received from the State in response to his discovery requests on the same day that he received them. Counsel also stated that he did not provide Robinson with a CD containing his police statement because CDs are prohibited in prison, but that he did provide him with a police report containing a synopsis of

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<sup>8</sup> See Super. Ct. Crim. R. 16 (setting forth information subject to disclosure by the State).

<sup>9</sup> See *State v. Winn*, 2004 WL 3030023, at \*2 (Del. Super. Dec. 23, 2004) (“[W]hile it is good practice, there is no requirement that counsel share discovery material with the defendant.”).

the witnesses' statements and discussed the contents of the statements with Robinson. Counsel's conduct was more than sufficient to keep Robinson advised of the case and the issues. This claim cannot survive the *Strickland* test.

*(5) Failure to Advise Defendant of Right to Testify on his Own Behalf*

Robinson contends that his counsel gave him bad advice by encouraging him not to take the witness stand. Counsel stated in his affidavit that he advised Robinson not to testify because he thought that Robinson would be a bad witness. Defense counsel noted that "inflammatory and incriminating statements" in Robinson's police statement could be used to impeach him on cross-examination. Furthermore, defense counsel stated that he conducted a relatively gentle mock examination session with Robinson and found him to be confused, contradictory, and self-incriminating. Finally, the trial transcript shows that the Court advised Robinson that he had a constitutional right to testify on his own behalf and that the decision about whether or not to testify ultimately rested with him.<sup>10</sup> Counsel's advice to Robinson not to testify on his own behalf reflects his professional judgment based on years of experience. Robinson was free to accept or reject his advice and was fully advised of that right. Nothing more is required and the Court concludes that counsel acted professionally and Robinson has failed to show prejudice as a result of his counsel's actions.

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<sup>10</sup> Trial Tr. 14-15, April 12, 2009.

## **(b) Procedurally Barred Claims**

The remainder of Robinson's claims are barred by the procedural limitations of Delaware Superior Court Criminal Rule 61. As such, the Court will give no consideration to the merits of Robinson's arguments with respect to these claims.

Rule 61(i)(3) prohibits consideration of "[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction" unless the defendant can show cause for relief from the procedural default and prejudice resulting from the default.<sup>11</sup> Rule 61(i)(5) provides limited relief from the procedural default rule where the defendant raises a "colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."<sup>12</sup> The so-called "fundamental fairness" exception is extremely narrow and applies "only in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal."<sup>13</sup> Several of Robinson's claims are procedurally barred and are not subject to the "fundamental fairness" exception.

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<sup>11</sup> Super. Ct. Crim. R. 61(i)(3).

<sup>12</sup> Super. Ct. Crim. R. 61(i)(5).

<sup>13</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

(1) *The Court Failed to Properly Instruct the Jury on the Manslaughter Charge*

Robinson argues that the Court failed to give a proper jury instruction on the lesser-included charge of manslaughter. In his brief supporting his Motion, Robinson sets forth the legal definitions of manslaughter and murder in the first degree and argues that the Court failed to explain to the jury the distinction between the two charges. He further suggests it was unreasonable to expect a jury to convict him of manslaughter when the prosecution had spent eight days explaining why he should be convicted of murder in the first degree. Robinson did not object to the manslaughter instruction at trial or on his direct appeal. He has not shown cause for his failure to object to the jury instruction earlier in the proceedings, nor has Robinson shown prejudice resulting from the alleged violation of his rights. There has been no legal development regarding manslaughter or jury instructions for manslaughter that would warrant invoking the “fundamental fairness” exception under Rule 61(i)(5). The jury was properly instructed and, accordingly, Robinson’s argument with respect to the jury instructions is procedurally barred under Rule 61(i)(3).

(2) *The Court Erred by Permitting Robinson’s Coerced Statement into Evidence*

Next, Robinson argues that the Court committed plain error by admitting into evidence the taped statement to police in which he admits to being the shooter. Robinson contends that the police engaged in gross misconduct and “trickery,” which resulted in a coerced statement. Robinson did not object to the admission of the statement at any point in the proceedings leading to his conviction. The transcript of Robinson’s statement to the police reflects that his statement was freely given and not the result of police coercion. As such, any objection by Robinson to the admission of the statement would have been unsuccessful and the admission of the statement was not plain error. Furthermore, Robinson has shown no basis for invoking the “fundamental fairness” exception under Rule 61(i)(5). Accordingly, the Court finds that Robinson’s claim of plain error with respect to the admission of his taped confession is procedurally defaulted under Rule 61(i)(3) and without merit.

(3) *The Court Committed Plain Error by Facilitating a Compromised Verdict*

Robinson further contends that the Court committed plain error by facilitating a compromised verdict. In essence, Robinson argues that he is wrongfully imprisoned because the evidence supports a conviction for

manslaughter rather than for murder in the first degree. The jury was provided the necessary instruction that allowed them to decide whether the lesser included offense of manslaughter was appropriate. They decided that the defendant's conduct was sufficient to warrant a Murder First Degree conviction and there is nothing to suggest that the verdict was the result of some undisclosed and inappropriate compromise by the jury. In addition to being procedurally barred because it was not raised on direct appeal, this argument is simply without merit.

(4) *The Trial Judge Committed Plain Error by Failing to Address Ex Parte Communications with the Jury*

Robinson argues that the Court and prosecution had contact with the jury outside of his presence. During jury deliberations, there was a technical problem that prevented the jury from reviewing certain evidence. After discussing the matter with counsel for both sides, the Court brought the jury into the courtroom to view the material via a laptop computer on the courtroom podium. Robinson contends that neither he nor his counsel were present for this exchange and that his rights were violated by the prosecution's contact with the jury outside of the presence of Robinson and his counsel. This representation is simply not correct. Robinson's counsel was present for this display of evidence, and since no new

evidence was being presented nor any discussion had with the jury, there was no requirement that the defendant be present for the limited purpose of showing them evidence that they were unable to view in the jury room during deliberations.

Accordingly, this claim is barred under Rule 61(i)(3).

(5) *The Court Violated Robinson's Constitutional Rights by Limiting Austin's Cross-Examination*

Robinson's final claim, that the Court violated his constitutional rights by limiting the cross-examination of Austin, was already rejected by the Delaware Supreme Court on direct appeal and therefore is barred by Rule 61(i)(4).<sup>14</sup> Rule 61(i)(4) bars this Court from considering "[a]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to a judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding. . . unless reconsideration of the claim is warranted in the interest of justice."<sup>15</sup> The "interest of justice" exception is exceedingly narrow and applies only where a defendant has shown that "subsequent legal developments have revealed that the trial court lacked authority to convict or punish him."<sup>16</sup> Robinson has presented nothing to the Court to show that the "interest of justice" exception should apply. Robinson's claim that the Court unconstitutionally limited his opportunity to cross-examine his co-defendant is procedurally barred.

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<sup>14</sup> *Robinson v. State*, 3 A.3d 257, 261-264 (Del. 2010).

<sup>15</sup> Super. Ct. Crim. R. 61(i)(4).

<sup>16</sup> *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990).

## CONCLUSION

For the reasons set forth above, the Court finds that all of Robinson's claims are either procedurally barred or without merit. Accordingly, the Defendant's Motion for Postconviction Relief is hereby DENIED.

/s/ William C. Carpenter, Jr.

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Judge William C. Carpenter, Jr.